Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1264

TABER INSTRUMENT CORPORATION, JOSEPH P. D'ANGELO, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER AND MARINE MIDLAND BANK-WESTERN,
Petitioners,

v.

JUNIA E. RAAB,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FEDERAL RULE:

Rule 41(b), Federal Rules of Civil Procedure 2, 4, 5, 7, 8, 9, 10, 11, 12

MISCELLANEOUS:

28 U.S.C. § 1254(1) 2
15 U.S.C. § 78j(b) 2
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ———

TABER INSTRUMENT CORPORATION, JOSEPH P. D'ANGELO, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER AND MARINE MIDLAND BANK-WESTERN,
Petitioners,

v.

JUNIA E. RAAB,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on December 13, 1976, or that the judgment and opinion be summarily reversed.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 546 F.2d 588 and is set out in Appendix A, *infra*. The opinions of the district court with respect to the motion to dismiss and the motion to

set aside judgment are not reported. Those opinions are set out in Appendices B and C, respectively, *infra*.

JURISDICTION

The opinion of the Court of Appeals was filed on December 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a defendant's readiness to initiate discovery or participate in settlement negotiations over a period of several months prevent the district court from considering the entire procedural history of a case extending over more than eight years in exercising its discretion with respect to dismissal under Rule 41(b)?

FEDERAL RULE INVOLVED

Rule 41(b), Federal Rules of Civil Procedure, provides, in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

STATEMENT OF THE CASE

This is an action brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j (b), seeking equitable relief in the form of rescission or, in the alternative, money damages. The action arose out of a transaction in which the assets of a small local company, Taber Instrument Corporation, located in Buffalo, New York, were sold by the shareholders in December 1966, to Teledyne, Inc. Taber Instrument had distributed shares to two of its employees, Junia Raab

and Joseph Less, who held managerial positions until their discharge in 1965. The company re-purchased the stock of these former employees in separate transactions in May and June of 1966. Appendix (hereinafter "App.") p. 2b.

In May 1967, each of the former employees brought an action against the company claiming that at the time of its purchase of the employee's shares the company knew, but failed to disclose, that serious negotiations were underway to sell the company's assets for a much higher per-share price. Both employees hired the same lawyer, and the actions were commenced at about the same time. Although the claims were, on the face of the complaints, virtually the same, the actions were brought and maintained separately. A motion by plaintiffs to consolidate was opposed by defendants on grounds that the separate transactions involved different circumstances and different negotiators, and that the defendants had different defenses involving separate wrongdoing by each of the employees. The plaintiffs withdrew their motion before it was considered by the district court, and the cases proceeded independently. App. pp. 2b, 5b.

Plaintiffs never pursued either case with any enthusiasm. A number of depositions were taken in 1967 shortly after the complaints were filed, and on October 26, 1967, the plaintiffs filed notes of issue declaring both cases ready for trial. The cases then languished for six and one-half years until a pretrial conference on June 3, 1974, when the district court conferred with counsel about completing discovery and setting trial dates. The court proposed that the *Less* case be scheduled for completion of discovery and trial and that during the period required for that action, further proceedings in the *Raab* case be postponed. This was thought to be necessary because the same lawyers represented plaintiffs and defendants in the two cases, and the proceed-

ings could not be conducted simultaneously. Counsel for all parties consented. An order reflecting this arrangement was issued on June 14, 1974. App. pp. 3b, 4b, 5b, 1g.

In November 1974, the *Less* case was settled before trial, and an order was entered on December 3, 1974, dismissing the complaint. The defendants then sought to settle the *Raab* case, but those efforts proved unavailing. On March 19, 1975, the court held a pretrial conference to set a timetable for the completion of pretrial proceedings.

Although plaintiff's only discovery in the *Raab* case consisted of a single deposition, plaintiff did not evince any interest in further discovery or in means to narrow the issues at trial. App. pp. 3a, 2f.

Defendants were in a different position. In the seven years since the filing of the complaint, defendants' case had been decimated by the deaths of three key witnesses, including the only two persons who had been involved in the disputed transactions as representatives of the defendants.[1] At the March 19 pretrial conference, defendants nonetheless requested sufficient time to undertake discovery. After assessing the present state of the case in light of the loss of its key witnesses, however, defendants elected not to commence discovery but moved instead to dismiss under Rule 41(b) for failure to prosecute. App. pp. 3b, 2f.

[1] The participants in the transaction between Mr. Raab and Taber Instrument Corporation were Mr. Raab and his lawyer, Mr. Ness, and Mr. Taber and his lawyer, Mr. McDonough. The participants in the subsequent transaction between Taber Instrument Corporation and Teledyne were Mr. Taber and his lawyer, Mr. McDonough; Mr. Singleton, the chairman of the board of Teledyne, and his lawyer, Mr. Kaufman; and a middleman, Dr. D'Angelo. Mr. Taber died on February 16, 1973; Mr. McDonough died on August 16, 1974; and Mr. Ness died in May, 1975. App. p. 3b.

The motion to dismiss was granted on November 25, 1975. The district court judge responsible for the case since 1967 examined the entire procedural history of the case and concluded:

> [T]here are many reasons why the motion to dismiss under Rule 41(b) must be granted. Beyond taking an occasional deposition, the plaintiff did little or nothing to prepare from 1967 until February 1973, when counsel filed a belated pretrial statement. On numerous occasions, the court urged plaintiff's counsel to prepare and warned that failure to prepare could result in dismissal. These warnings were ignored. App. p. 9b.

The record confirms the soundness of the district court's conclusions.

For *seven years*, from May 10, 1967 (when the complaint was filed) to June 3, 1974 (when further proceedings were postponed temporarily while the *Less* case went forward), the plaintiff did virtually nothing on his own initiative. In those *seven years*, plaintiff filed four notes of issue (required by court rule), took one 27-page deposition (required after the court threatened dismissal), filed one incomplete pretrial statement (required by court order), filed one motion that was quickly withdrawn, raised one objection, and attended seven pretrial conferences (required by court order). Plaintiff *twice* faced dismissal and *four* times failed to comply with court orders.[2]

[2] In 1970, the clerk of the district court gave notice that an order of dismissal would be entered at the call of the dismissal calendar because no action whatsoever had been taken by the plaintiff in the preceding year. Joint Appendix in the Court of Appeals (hereinafter 2d Cir. App.), p. 43. In 1971, the plaintiff again missed the deadline for filing a note of issue, and the court again took action looking to a dismissal for failure to prosecute. 2d Cir. App., pp. 84-88.

Over a period of nearly two years, from January 1971 through November 1972, the court issued four orders requiring plaintiff to

From June 1974 through December 3, 1974, both parties attended to the *Less* case, and no action was taken in the *Raab* case.

After December 1974, plaintiff took no further positive action and continued with dilatory tactics. Plaintiff failed to comply with a direction of the court to submit a motion with respect to use of deposition transcripts, failed to meet the deadline set for response to defendant's motion to dismiss and failed to respond in any manner to an interrogatory served by defendant D'Angelo.[3] Plaintiff can point to no action during that period that was: (a) taken at plaintiff's initiative; (b) useful in bringing the case on to trial; and (c) timely or diligently completed.

In reviewing the entire procedural history of the case, the district court considered defendant's actions as well as plaintiff's failures.

> I have taken into consideration the suggestion . . . that the failure of a defendant to call the Court's attention to a plaintiff's undue delay in bringing a case on for trial, by formal motion or otherwise, may be considered as a factor in forming the court's discretion. In the *Raab* case, the defendants have always asserted their readiness for trial. At times they sought adjournments of depositions from the plaintiff, but the plaintiff agreed to this procedure and took no steps to hasten discovery. The defendants never delayed proceedings before the Court. App. pp. 8b, 9b.

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file a pretrial statement. 2d Cir. App., pp. 89-90, 91-92, 96-97, 98-99. Plaintiff ignored the first three and, after the deadline for the fourth passed, submitted an incomplete statement that did not meet the requirements of the order. 2d Cir. App., pp. 101-12.

A copy of the Joint Appendix in the Second Circuit has been lodged with this Court.

[3] 2d Cir. App., pp. 182, 238-39, 351.

Plaintiff appealed the dismissal. Despite the extraordinary delay by plaintiff, the Court of Appeals held that the district court abused its discretion by considering the entire procedural history of the case—including events prior to its order of June 14, 1974. The Court of Appeals apparently found that plaintiff's dilatory conduct subsequent to June 14, 1974 was not sufficient to support a motion to dismiss under Rule 41(b) and therefore reversed. The Court held:

> In the opinion of the court the delay between 1967 and 1974 constituted a sufficient reason for its action. We disagree. No matter what the reasons may have been for the parties' inaction for this unusually protracted period, there is no doubt that both court and counsel, by their own actions from June 14, 1974 on, breathed new life into dormant cases. 546 F.2d at 524; App. p. 4a.

The Court ordered that the action be restored to the trial calendar of the district court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Misinterprets Rule 41(b) in Conflict with the Decisions of this Court and other Courts of Appeals.

The Second Circuit has created an important new interpretation of Rule 41(b) that conflicts with the decisions of this Court and at least two other circuits. The Second Circuit held that if the court or defendant takes an action that "breathes new life" into the case, the trial court is prevented from examining the entire procedural history of the case in exercising its discretion with respect to a motion to dismiss. No matter how egregious the plaintiff's previous conduct, no matter how outrageous the delay, and no matter how substantially defendants have been adversely affected, the slate is wiped clean, and plaintiff is permitted to proceed with his action.

This "clean slate" rule is contrary to the interpretation of Rule 41(b) set out by this Court and at least two Courts of Appeals that requires an examination of the entire procedural history of a case and a balancing of plaintiff's delays against subsequent activity to determine whether plaintiff's conduct amounts to a failure to prosecute.

In *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962), there was a six-year delay before the district court dismissed sua sponte under Rule 41(b) for failure to prosecute. The action had been commenced in 1954. In 1955 the district court granted a motion for judgment on the pleadings and in 1956 the Court of Appeals reversed. When the case returned to the district court, a trial date was set for July 1957 but, on motion of the plaintiff and with the consent of the defendant, that date was vacated. Then defendant initiated discovery. Another trial date was set for July 1959. On the defendant's motion this time, with the consent of the plaintiffs, this date was also vacated. The defendant then undertook more discovery. A pretrial conference was scheduled in October 1960. Plaintiff's counsel did not appear, and the district court dismissed. The Court of Appeals and this Court affirmed. This Court held:

> On this record we are unable to say that the District Court's dismissal of this action for failure to prosecute, as evidenced only partly by the failure of petitioner's counsel to appear at a duly scheduled pretrial conference, amounted to an abuse of discretion. . . . [I]t could reasonably be inferred from his absences, as well as from the drawn-out history of the litigation . . . that petitioner had been deliberately proceeding in dilatory fashion. 370 U.S. at 633.

No action by the court or defendant stopped the clock on plaintiff's delay. This Court looked at the entire procedural history of the case, including plaintiff's delay, to determine if the failure to prosecute standard had been met.[4]

The District of Columbia Circuit and the Tenth Circuit have also held that subsequent action does not "cure" prior delay and that a plaintiff who engages in delay risks dismissal of his action at any time before trial.

In *Sheaffer* v. *Warehouse Employees Union, Local 730*, 408 F.2d 204 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969), there was a four-year delay. The plaintiff proceeded in a dilatory fashion from August 1963 when the complaint was filed until November 1967 when new counsel was appointed. After new counsel came into the case, a trial date was set for January 9, 1968. Four days before trial, the defendants moved to dismiss under Rule 41(b), and their motion was granted. Upholding the district court's order, the appellate court found:

> Upon inspection of all the pleadings we find that this case was handled in an extremely dilatory fashion. . . . Appellants' lethargy ceased on November 6, 1967, when their present counsel entered the case as co-counsel. We find, however, that after over four years of procrastination his arrival came too late to save appellants' cause of action. 408 F.2d at 205.

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[4] This Court noted:

> [T]he plaintiff failed to answer the defendant's interrogatories from August 17, 1957, until the day before the hearing on the order to show cause why the case should not be dismissed for want of prosecution—which was more than 19 months later. Although the next delay was occasioned by the defendant's motion, it was consented to by the plaintiff and there is no showing whatever that plaintiff ever made any effort to bring the case to trial. In fact, when the defendant submitted further interrogatories, plaintiff again moved to have the time to answer extended. Against this background, it is hardly surprising that the District Court concluded that the failure to appear for a pretrial conference was merely another delaying tactic. 370 U.S. at 634-35 n.11.

Subsequent action by counsel for plaintiffs and the action of the court in setting the trial date had no effect on the grounds for dismissal that had already accrued. *Cf. Hicks* v. *Bekins Moving & Storage Co.*, 115 F.2d 406 (9th Cir. 1940).

In *Securities and Exchange Commission* v. *Power Resources Corp.*, 495 F.2d 297 (10th Cir. 1974),[5] there was a three-year delay after the SEC filed a motion for preliminary injunction. During this period the SEC obtained permanent injunctions, by consent, against some of the defendants, but it did not pursue the pending motion. The trial court set the motion for hearing and at that hearing denied the preliminary injunction and dismissed the action under Rule 41(b). The appellate court affirmed:

> There is no precise rule as to what circumstances justify a dismissal for failure to prosecute. Instead, the procedural history of each case must be examined to make such a determination. . . . [T]he SEC made no effort whatsoever to have its motion heard. It seeks to place the blame for this upon the trial court. . . . This does not excuse its failure to diligently prosecute the case. 495 F.2d at 298.

Again, subsequent action by the court in setting an evidentiary hearing had no effect on the grounds for dismissal which had already accrued.[6]

The district court, in the *Raab* case, followed precisely the procedure required by *Link*, *Sheaffer*, and *Power Resources*. It looked at the entire eight-year history of the case; it weighed the effect of the plaintiff's delay; it evaluated the contribution of the court and the defend-

[5] Hon. Tom C. Clark, Associate Justice, Retired, United States Supreme Court, sitting by designation.

[6] *See also Russell* v. *Cunningham*, 233 F.2d 806 (9th Cir. 1956), where a complaint pending for 15 months was dismissed for failure to prosecute despite a continuance agreed to by the parties after 12 months of delay.

ants to the delay; and it emphasized the previous warnings of the court to the plaintiff that had been ignored. Under these circumstances—of which the trial court was personally aware—the court dismissed the action.

The contrary interpretation of the Court of Appeals is a serious limitation on the power of the district court to rid its calendar of cases not pursued diligently by plaintiffs.[7] Once a court or defendant acts in such a way as to "breathe new life" into a case, under the Second Circuit approach, the entire procedural history of delay disappears and can no longer be considered in deciding a motion to dismiss for failure to prosecute.

There are now over 9,400 civil cases that have been pending for three years or longer on the calendars of the district courts.[8] The rule adopted by the Second Circuit could prevent a large number of these cases from being dismissed. That interpretation is not required by the language of Rule 41(b), is inconsistent with the interpretation of this Court and at least two other Courts of Appeals, and should not be permitted to stand.

2. The Decision Below Unreasonably Restricts the Traditional Authority of Trial Courts To Dismiss Cases for Procedural Delay and Does So on Grounds that Justify Review by this Court.

This Court has considered the scope of the first sentence of Rule 41(b) only once.[9] *Link* v. *Wabash Rail-*

[7] The trial court's power under Rule 41(b) is coextensive with its inherent power to dismiss for failure to prosecute in order "to manage [its] . . . own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R.R.*, 370 U.S. 626, 630-31 (1962).

[8] Administrative Office of the United States Courts, MANAGEMENT STATISTICS FOR UNITED STATES COURTS 1976 127 (October 1976).

[9] Other cases have involved the subsequent provisions of the rule with respect to the nature of the dismissal, *Costello* v. *United*

road Co., 370 U.S. 626 (1962). In that case the court pointed out that the power to invoke the sanction of dismissal for procedural delay had a long history at common law and that the purpose of Rule 41(b) was to recognize, not limit, that power. 370 U.S. at 630. The rule articulated by the Second Circuit, reversing the district court's action, unreasonably restricts the trial court's inherent power to clear its calendar of cases where plaintiffs have been inactive or dilatory. This rule, and especially the factors cited in support of it, cannot be defended on policy grounds.

Settlement discussions. The Court of Appeals makes numerous references to the settlement negotiations among the parties. After the district court's order of June 14, 1974, the parties undertook settlement negotiations in the *Less* case. Five months later that case was settled. The parties then engaged in settlement talks about the *Raab* case for two months but were unable to come to any agreement. App. p. 26.[10] The Court of Appeals

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States, 365 U.S. 265 (1961); *United States* v. *Lucchese*, 365 U.S. 290 (1961); *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677 (1958); and the relationship between Rule 41(b) and Rule 37, *Societe Internationale Pour Participations Industrielles et Commercials* v. *Rogers*, 357 U.S. 197 (1958).

[10] The Court of Appeals was inordinately interested in these settlement discussions. It points out:

> The differential between the amount received by Less and the Teledyne price was $40 a share or $560,000 for his 14,000 shares. Using comparable figures, and disregarding other factors, the Raab differential would have been $25,200. The same counsel represented both Raab and Less.
>
> * * * *
>
> In November 1974 the *Less* case was settled for $560,000 (apparently the difference between $10 and $50 a share for the 14,000 shares) and on December 3, 1974 an order terminating the *Less* case was entered.

[Footnote continued on page 13]

evidently believed that by engaging in settlement negotiations after sufficient delay had accumulated to support a motion to dismiss, the defendants had somehow waived their right to make that motion when the settlement negotiations failed.

The decision below will serve as a deterrent to the fundamental policy favoring and encouraging settlement by creating additional costs or risks to the initiation of bona fide settlement negotiations. The district court's dismissal was based on plaintiff's inactivity from 1967 through 1973, balanced against the plaintiff's efforts and the defendants' activities in the post-1973 period. The plaintiff's delay of six years or more cannot be outweighed per se by the maximum of eight months' delay between June 1974 and February 1975,[11] possibly attributable to settlement negotiations. Penalizing defendants for engaging in settlement negotiations, particularly those that were substantially fruitful in disposing of the larger case, is contrary to fundamental objectives of efficiency and fairness in the administration of justice.

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[10] [Continued]

> It was now in order for the *Raab* case to proceed. Settlement negotiations were re-commenced without success.
>
> * * * *
>
> McDonough's death in August, 1974 did not deter the parties from a continuance of . . . settlement conferences for a year thereafter. 546 F.2d at 523-24; App. pp. 2a, 3a, 4a.

[11] In fact, there was no delay for settlement negotiations from June 1974 through October 1974 because a trial date remained set for October 15, 1974, throughout that period. App. p. 2g. The only delay attributable to the *Less* settlement is the one month during which the trial was deferred to permit completion of the settlement negotiations, App. p. 7b, and perhaps including the additional time to implement the settlement through December 3, 1974, the date of the order finally ending the case—a delay of no more than 48 days.

Discovery activities. The trial court's order of June 14, 1974, permitted new counsel [12] approximately ten days to complete their activities to familiarize themselves with the *Less* case and to submit discovery requests in that case if necessary. App. p. 2g. None was submitted.

At a pretrial conference in the *Raab* case on March 19, 1975, the court granted defendants an opportunity to complete discovery through interrogatories served within 40 days and depositions completed within 60 days after receiving the interrogatory answers. App. p. 2f. No discovery requests were submitted in this case either.[13]

The Court of Appeals apparently considered the willingness of defendants to consider going forward with the case through discovery to be an acknowledgment that they had not been injured by plaintiff's prior delay and that the case should go forward.[14]

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[12] For many years, the Taber Instrument Corporation and its officers and directors had been represented (in both the *Less* and *Raab* actions) by Mr. McDonough, the corporation's long-time counsel. Prior to trial new counsel were retained by two of the three former officers and directors then living—Warren Hildebrandt and Benjamin Manasen—and the executors of the estate of a fourth officer and director, Ralph Taber, who had died in the interim. App. p. 2g.

[13] On April 29, 1975, prior to the expiration of the time for discovery by interrogatories, defendants filed their motion to dismiss and an accompanying motion to stay discovery pending decision of that motion.

[14] The Court of Appeals pointed out:

> The Court scheduled a pretrial Conference for March 19, 1975 at which time the court allowed the defendants time for additional discovery—actually extended to August 1, 1975.
>
> There can be no question that all counsel, parties and the court understood and acquiesced in the above time schedule. None of the grounds, now so vigorously asserted by the appellees as prejudicial, [the deaths of three key witnesses and the disappearance of other evidence over seven years] were advanced in opposition to the court's order of June 14, 1974 or to subseqeunt proceedings. 546 F.2d at 523; App. A, pp. 3a, 4a.

Again, the Court of Appeals has apparently penalized defendants for conducting themselves in a manner that contributes to the efficiency of the judicial process. Defendants proposed to engage in discovery and then to attempt to limit the factual issues by submitting requests for admissions under Rule 36. App. p. 2f. Requests for admissions without prior discovery are not usually fruitful; and trial without limiting the factual issues where possible is a waste of the trial court's time. When the defendants made their request, there had been *no* previous discovery in the *Raab* case by the defendants, and the plaintiffs had taken only one very short deposition. App. p. 4b.

The minimal delay attributable to defendants' consideration of discovery—a 10-day period in 1974 (in the *Less* case) and a 40-day period in 1975 (in the *Raab* case)—cannot reasonably outweigh plaintiff's delay of over six years.

Defendants were cognizant of the Second Circuit's view that dismissal with prejudice is a harsh remedy to be utilized only in extreme situations. *Theilman* v. *Rutland Hospital, Inc.*, 455 F.2d 853 (2d Cir. 1972). Defendants were entitled to elect to explore the possibility that discovery would yield evidence sufficient to overcome the loss of three key witnesses and to permit the presentation of a defense. To hold, as did the Court of Appeals, that this election barred dismissal is to penalize prudence and to ignore the enormous costs of delay.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted or the decision below should be summarily reversed.

Respectfully submitted,

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March 11, 1977

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 35—September Term, 1976

(Argued October 15, 1976 Decided December 13, 1976)

Docket No. 76-7004

JUNIA E. RAAB,
Plaintiff-Appellant,

—against—

TABER INSTRUMENT CORPORATION, JOSEPH P. D'ANGELO, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER and MARINE MIDLAND BANK-WESTERN,
Defendants-Appellees.

Before: MOORE, ANDERSON and GURFEIN, *Circuit Judges.*

Appeal from orders entered in the United States District Court for the Western District of New York, Honorable John T. Curtin, *Judge*, dismissing for lack of prosecution appellant's action for rescission, and denying appellant's motion to set aside the judgment of dismissal.

Reversed.

DAVID MONTGOMERY, Esq. (Buffalo, New York); Heffernan, Sweet & Murphy, of counsel, Buffalo, New York, *for Plaintiff-Appellant.*

DEANNE C. SIEMER, Esq. (Buffalo, New York); Falk, Siemer, Glick, Tuppen & Maloney; Phillips, Lytle, Hitchcock, Blaine & Huber; Hodgson, Russ, Andrews, Woods & Goodyear; and Brennan, Tesseyman, Zelman, Runfola and Brownstein, of counsel; Robert M. Hitchcock, Esq., Victor T. Fuzak, Esq., and Ross L. Runfola, Esq., on the brief, *for Defendants-Appellees.*

PER CURIAM:

Plaintiff, Junia E. Raab, appeals from (1) a judgment, dated November 25, 1975, dismissing his complaint for failure to prosecute in an action brought by him against Taber Instrument Corporation (TIC), Joseph P. D'Angelo, Benjamin Manasen, Warren J. Hildebrandt, Cindy R. Taber and Marine Midland Bank-Western, defendants-appellees; and (2) for an order entered upon the denial of a motion (March 7, 1976) to set aside the judgment of dismissal pursuant to Rule 60(b), F.R.Civ. P. The appeals have been consolidated for hearing.

The action (hereinafter referred to frequently as the "*Raab*" case) was, in brief, based upon Raab's claim that TIC on June 3, 1966 purchased his 600 shares of TIC stock for $8 a share ($4800), knowing, but failing to disclose, that serious negotiations were underway to sell TIC to Teledyne, Inc. for $50 a share.

Raab brought his action for rescission in May, 1967. At or about the same time, another stockholder, Joseph F. Less (Less) who had sold to TIC his 14,000 shares of TIC stock for $10 a share, brought suit for rescission. The differential between the amount received by Less and the Teledyne price was $40 a share or $560,000 for his

14,000 shares. Using comparable figures, and disregarding other factors, the Raab differential would have been $25,200. The same counsel represented both Raab and Less.

The two cases between May 8, 1967 (Less) and May 10, 1967 (Raab) and June 3, 1974 produced sundry depositions, notes of issue, calendar calls, pretrial conferences, etc. Obviously, the indigation which produced the actions in 1967 had not been transmitted into any hurried desire of the respective plaintiffs to recoup their alleged losses by pressing for early trials. However, this lethargic state changed in the first half of 1974 when, as stated in the District Court's order of June 14, 1974:

> "At the June 3, 1974 meeting of attorneys with the court, it was agreed by all counsel that the trial in the case of *Less* v. *Taber Instrument Corp., et al.*, Civil 1967-182, should proceed first and that the proceedings in the case of *Junia E. Raab* v. *Taber Instrument Corp., et al.*, Civil 1967-190, be deferred until after the *Less* trial."

In November 1974 the *Less* case was settled for $560,000 (apparently the difference between the $10 and $50 a share for the 14,000 shares) and on December 3, 1974 an order terminating the *Less* case was entered.

It was now in order for the *Raab* case to proceed. Settlement negotiations were re-commenced without success. The court scheduled a pretrial conference for March 19, 1975 at which time the court allowed the defendants time for additional discovery—actually extended to August 1, 1975.

There can be no question that all counsel, parties and the court understood and acquiesced in the above time schedule. None of the grounds, now so vigorously asserted by the appellees as prejudicial, were advanced in opposition to the court's order of June 14, 1974 or to

subsequent proceedings. However, shortly after the March 19, 1975 pretrial conference the purpose of which should have been to ascertain that all was in readiness for trial, appellees moved (April 29, 1975) to dismiss for want of prosecution despite the fact that pursuant to court direction discovery was supposedly underway. Arguments were had on this diversionary tactic and finally on November 25, 1975, by which time a trial on the merits could undoubtedly have been held, the court granted the motion to dismiss for failure to prosecute. In the opinion of the court the delay between 1967 and 1974 constituted a sufficient reason for its action. We disagree. No matter what the reasons may have been for the parties' inaction for this unusually protracted period, there is no doubt that both court and counsel, by their own actions from June 14, 1974 on, breathed new life into dormant cases.

The appellees now claim that because of the deaths of important potential witnesses (Taber, who died in February, 1973 and McDonough, who died in August, 1974) they have been seriously prejudiced by the delay. At the time of appellees' agreement with the order of June 14, 1974, Taber had no longer been available for over fifteen months, but his death was no obstacle to their agreement in the order, and McDonough's death in August, 1974 did not deter the parties from a continuance of trial preparations and settlement conferences for a year thereafter.

Insofar as the parties refer *in extenso* to the merits, the merits are not relevant to the single issue before us at this time. We merely hold that the judgment dismissing this action for want of prosecution should be reversed and the action restored to the trial calendar of the District Court. In view of this decision, it is unnecessary to act upon the appeal from the denial of appellant's motion under Rule 60(b).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 1967-190

JUNIA E. RAAB,

Plaintiff

—vs—

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants

APPEARANCES:

HEFFERNAN, SWEET & MURPHY (DAVID L. SWEET, ESQ., of Counsel), Buffalo, New York, for Plaintiff.

FALK, SIEMER, GLICK, TUPPEN & MALONEY (EDWARD D. SIEMER and DEANNE C. SIEMER, ESQS., of Counsel), Buffalo, New York, for Estate of Ralph F. Taber.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (ROBERT M. HITCHCOCK, ESQ., of Counsel), Buffalo, New York, for Defendant Joseph P. D'Angelo.

BRENNAN, CALLAHAN, TESSEYMAN, ZELMAN & RUNFOLA (ARNOLD N. ZELMAN and ROSS L. RUNFOLA, ESQS., of Counsel), Buffalo, New York, for Defendant Benjamin Manasen.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (VICTOR T. FUZAK, ESQ., of Counsel), Buffalo, New York, for Defendant Warren J. Hildebrandt.

Defendants move to dismiss this action under Rule 41(b) of the Federal Rules of Civil Procedure for failure of plaintiff to prosecute, and also move to dismiss because the delay of the plaintiff has caused irreparable injury to defendants. In opposition to this motion, plaintiff asserts that the history of this case must be considered in relationship to that of *Less* v. *Taber Instrument Corporation*, Civil 1967-182, which was filed on May 9, 1967 and in which many of the same issues were involved. The same attorneys represented the parties in both cases. Violations of § 10(b) of the Securities and Exchange Act of 1934 and Rule 10(b) of the Securities and Exchange Commission were charged. In each case the plaintiff alleges that Taber Instrument Corporation [Taber Instrument] bought plaintiff's stock without disclosing to plaintiff that serious negotiations were being conducted with Teledyne, Inc. for the acquisition of Taber Instrument for a price equivalent to about $50 per share. Less' 14,100 shares of stock were purchased on May 4, 1966 for $10 per share, and Raab's 600 shares of stock were purchased on June 6, 1966 for $8 per share. The defenses in each case were similar. Defendants denied the allegations of secret dealing with Teledyne, Inc. [Teledyne] and assert that the price paid was a good one. Both plaintiffs received at the time of payment certain profit sharing moneys claimed by them from the corporation's profit sharing plan.

When the *Less* case was set for trial in the fall of 1974, it was settled for the sum of $560,000. Following disposition of the *Less* case, efforts to settle the *Raab* case proved fruitless. When the court had not heard from counsel, in February 1975 a meeting was scheduled. This motion to dismiss was filed shortly thereafter, in April 1975. The court then held another round of sessions with counsel in an attempt to settle this litigation, without success.

By this motion, defendants charge that plaintiff did little or nothing to prepare and bring this case to trial from 1967 until the present and, upon that ground alone, dismissal should be granted. *Messenger* v. *United States*, 231 F.2d 328 (2d Cir. 1956). In *Messenger*, the "operative condition of the Rule [41(b)]" was described as "lack of due diligence on the part of the plaintiff—not a showing by the defendant that it will be prejudiced . . . ." 231 F.2d at 331. An additional ground asserted by defendants is that, because of plaintiff's delay, defendants are deprived of the testimony of their two most important witnesses, Ralph Taber and Charles McDonough. On February 16, 1973 Mr. Taber, who had been president, founder and principal stockholder of Taber Instrument, died. Charles McDonough, the attorney for Mr. Taber and the corporation, died on August 16, 1974. Both had been closely connected with the negotiations with Mr. Raab and with Teledyne. Defendants assert that without their testimony, their case is seriously prejudiced. Furthermore, in May 1975 Franklin Ness, who was one of the principal negotiators for plaintiff, also died.

An examination of the Clerk's docket and the papers filed reveals an almost complete lack of activity on the part of plaintiff from 1967 until 1974. One explanation which plaintiff offers for this is that the depositions taken in the *Less* case were to be used also in the *Raab* case. There is nothing in the record to support plaintiff's assertion and defendants vigorously deny that there was any agreement between the parties to this effect. Probably the evidence about the negotiations between Teledyne and Taber Instrument would be pertinent to both cases, but the negotiations between Mr. Less and Taber Instrument would not be relevant to the *Raab* case. When the record in the *Raab* case is considered standing alone, plaintiff took no action whatever in 1967

or 1968 beyond filing a note of issue in each year certifying that the case was ready for trial. In fact, as later events bore out, the case was not at all ready for trial at those times. In 1969, because plaintiff did nothing at all, the case appeared on the dismissal calendar in February 1970. Because plaintiff promised to take prompt action in preparing for trial, dismissal was stayed by the court until June 1970. Although plaintiff's activity from February to June was limited to taking a short deposition from Charles McDonough, nevertheless, the court lifted the threat of dismissal. Promises of continued preparation were short-lived, however, for the only action plaintiff took during 1970 was to file a note of issue in October.

In early 1971 when plaintiff's application for the late filing of a note of issue was granted, the court set a pretrial conference for April 2, 1971. In preparation for the pretrial conference, plaintiff was directed to submit a detailed statement of fact, a statement of legal issues, a list of exhibits, a list of possible witnesses and a list of depositions to be used at trial. Plaintiff failed to file the required statement on time, but instead filed a notice of issue in October 1971. In 1972 the case went to the Magistrate for a pretrial conference but, since plaintiff had failed to comply with the order directing the filing of a pretrial state, the meeting was adjourned until December 13, 1972. For various reasons, the conference was adjourned again until February 1973 when plaintiff finally filed the directed statement, and another conference was held on March 16, 1973. At that time the death of Mr. Taber in February 1973 was reported. Delay necessarily followed so that the executors for his estate could be appointed and substituted as parties in the action. In September 1973, plaintiff's motion to substitute the executors of Mr. Taber's estate as parties-defendant was granted. However, plaintiff took no action until February 1974 when again the court scheduled a meeting. Plaintiff's response to that notice was to file a motion to consolidate the *Raab* case with the *Less* case. After all defendants objected, the motion was withdrawn at a meeting held with the court on June 3, 1974. At that meeting, a trial date was set for the *Less* case in the fall of 1974, and the *Raab* case was postponed until after the *Less* case was completed.

In order to highlight the argument of plaintiff's counsel in a manner most favorable to him, I have attached a schedule of depositions taken in both the *Less* and *Raab* proceedings, prepared by the plaintiff in opposition to this motion.[1] This list reveals that in 1967 eight depositions were taken; in 1968, three; in 1969, four; in 1970, five; in 1971, none; and in 1972, four. I have also attached a schedule prepared by defendants, which is an analysis of plaintiff's activities from October 26, 1967 to June 3, 1974, as revealed by the affidavits of plaintiff's counsel submitted in opposition to this motion to dismiss.[2] This schedule does not purport to set forth everything plaintiff did, but evidently plaintiff's counsel believed that the activities listed were important enough to list. It is apparent from a perusal of these schedules that plaintiff approached the preparation of these cases in a most leisurely fashion. There were many months when nothing occurred at all, and, in some instances, a span of several months elapsed before plaintiff took any action. Plaintiff failed to resort to any discovery devices beyond the taking of depositions. No interrogatories were posed and no requests for admissions were sought. Plaintiff's counsel asserts that there was delay in the taking of some depositions because of the refusal of some witnesses to answer questions put to them which required resort to the court for directions. This happened on occasion, but the taking of some depositions was ad-

journed for several months at the request of plaintiff's counsel to examine documents.

Plaintiff's counsel has failed to explain satisfactorily why there was a delay in the attempt to take the depositions of the Chairman and counsel of Teledyne and of the defendant Himmelfarb, who was in the *Less* case, until 1971. The Teledyne witnesses resided in California and Mr. Himmelfarb in Mexico. After plaintiff was rebuffed in efforts to obtain an order requiring these witnesses to travel to Buffalo for a deposition, the efforts to depose them were dropped. When the issues at stake in these cases are considered, it is difficult to understand why the plaintiffs did not pay the plane fare for travel to Buffalo. In any event, plaintiff's counsel offered no excuse for the four-year delay.

The record does not support plaintiff's argument that the delay was caused because this was a complex securities case. There were only about five persons involved in the transactions between Taber Instrument and Teledyne, and only four between Taber Instrument and the plaintiff. In support of the claim of complexity, plaintiff's counsel describes the exhibits as comprising a pile a foot and a half in height. However, almost all of these documents were available to plaintiff since November 1967, at which time plaintiff had taken the depositions of Mr. Taber and Mr. D'Angelo. Furthermore, there are many cases in which the number of documents and complexity of the issues are much greater than in this case.

After the death of Mr. Taber in 1973, the proceedings were delayed to obtain the appointment of an executor for Mr. Taber's estate and to obtain representation for the estate. This delay cannot be attributed to plaintiff. Robert M. Hitchcock, who was counsel for defendant D'Angelo, reported that his firm was also the attorney for the estate of Ralph Taber. Special arrangements had

to be made before the Siemer firm could be retained by the estate. Delay was caused because Mr. McDonough insisted upon remaining as trial counsel in spite of the fact that he was an important witness. However, plaintiff had been aware of this problem from the beginning of the lawsuit and had made no move to require substitute counsel until 1973. In addition, plaintiff's attorneys were also witnesses to the negotiation of the sale of Mr. Raab's interest. They made no effort to secure trial counsel until shortly before the *Less* case was set for trial.

Further complication arose in February 1974 when the Honorable John O. Henderson, Chief Judge in this district, died. I was left with the conduct of all civil and criminal cases in the Buffalo area until January 1975. At the time of his death, I was engaged in the trial of a complicated organized crime case which did not end until late April 1974. Following an April 29, 1974 meeting with counsel, plaintiff promptly complied with the orders of the court and was ready to proceed in October 1974 when defendants requested a one-month delay.

The belated activity of plaintiff in 1974 cannot save plaintiff's cause. Although dismissal with prejudice is a harsh remedy which should be utilized only in extreme situations, *Theilmann* v. *Rutland Hospital, Inc.*, 455 F. 2d 853 (2d Cir. 1972), nevertheless, the authority to invoke it for lack of prosecution is an inherent ". . . control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962). In *Theilmann*, dismissal was granted for failure to prosecute when plaintiff's counsel failed to appear for trial on the date set some fifteen or twenty days earlier, and counsel appeared the following day and argued for adjournment. In *Securities and Exchange Commission* v. *Power Resources Corp.*, 495 F.2d

297 (10th Cir. 1974), the dismissal was granted for failure to prosecute under Rule 41(b) when there was a three-year delay. The plaintiff SEC attempted to excuse this period of inactivity on the ground that it was conducting discovery. Where the facts depict "a drawn-out history" of "deliberately proceeding in dilatory fashion" the action may be dismissed. *Link* v. *Wabash Railroad Co., supra,* at 633. In *Von Poppenheim* v. *Portland Boxing & Wrestling Commission,* 442 F.2d 1047 (1971), dismissal was granted pursuant to Rule 41(b) where plaintiff failed to comply for eleven months with court order that he set forth with specificity acts which he claimed formed the basis of his antitrust suit.

Recently the Second Circuit had occasion to discuss Rule 41(b) in *Finley* v. *Parvin/Dohrman Co., Inc.* (2d Cir., No. 1285, decided August 6, 1975). In that case, after the complaint was filed in August 1970, it was transferred from Illinois to New York. About a year later, plaintiff filed notices to take depositions and, by stipulation, these depositions were put off until May 1972. The case lay dormant for three years until March 1975, when it was assigned to Judge Wyatt in the Southern District of New York. Judge Wyatt refused to dismiss the action under Rule 41(b) because he believed that confusion arose upon how to proceed under the individual assignment system which had recently gone into effect in the Southern District. However, Judge Friendly pointed out that the Circuit Court "would not have reversed if Judge Wyatt had granted the motion to dismiss." Slip op. at 5390.

Some courts have held that there is no duty upon the defendant to expedite the case and urge disposition of it. *See Bendix Aviation Corp.* v. *Glass,* 32 F.R.D. 375, 378 (E.D. Pa. 1962). However, in approaching a decision in this case, I have taken into consideration the suggestion made in the *Finley* case that the failure of a

defendant to call the court's attention to plaintiff's undue delay in bringing a case on for trial, by formal motion or otherwise, may be considered as a factor in forming the court's discretion. In the *Raab* case, the defendants have always asserted their readiness for trial. At times they sought adjournments of depositions from the plaintiff, but the plaintiff agreed to this procedure and took no steps to hasten discovery. The defendants never delayed proceedings before the court.

In considering the history of this case, there are many reasons why the motion to dismiss under Rule 41(b) must be granted. Beyond taking an occasional deposition, the plaintiff did little or nothing to prepare from 1967 until February 1973, when counsel filed a belated pretrial statement. On numerous occasions, the court urged plaintiff's counsel to prepare and warned that failure to prepare could result in dismissal. These warnings were ignored. No reason is given for the delay in the application for the taking of the Himmelfarb and Teledyne witnesses until 1971, four years after the institution of the case, for the leisurely pace of deposition taking of other witnesses from 1967 until 1971, or for the failure to use other discovery devices. No applications were made by plaintiff to bring defendants to account if they failed to abide by a scheduled date for a deposition taking. The plaintiff has not even attempted to explain why he failed to comply, from April 1971 until February 1973, with the court order to file a pretrial statement.

Because plaintiff has failed to prosecute this case reasonably for trial, the motion to dismiss is granted on that ground alone. Furthermore, the motion is also granted because plaintiff's delay has now seriously prejudiced defendants' case. Messrs. Taber and McDonough are no longer present to set forth defendants' position on the issues. The Clerk is directed to enter judgment

against the plaintiff, in favor of all the defendants, dismissing the complaint.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: November 25, 1975

1

SCHEDULE OF DEPOSITIONS
TAKEN IN LESS & RAAB PROCEEDINGS

Date	Party	By Whom Taken
7/31/67	Ralph F. Taber	Plaintiff (Less)
8/ 1/67	Ralph F. Taber	" "
8/ 3/67	Ralph F. Taber	" "
8/ 3/67	Warren Hildebrandt	" "
8/ 4/67	Benjamin Manasen	" "
10/26/67	Warren Hildebrandt	" "
10/26/67	Teledyne Inc., by the General Mgr. of N. Tona, N. Y. Plant, Leland Coulter	" "
11/ 9 67	Joseph D'Angelo	" "
1/12/68	Joseph D'Angelo	" "
2/12/68	Joseph Less	Defendants
5/17/68	Charles Till, V. P. Marine Midland Trust Company, First Trust Office	Plaintiff (Less)
7/17/69	Joseph Less	Defendants
7/31/69	Joseph Less	"
9/26/69	Noel Bartlo	Plaintiff (Less)
10/15/69	Noel Bartlo	" "
1/29/70	Charles McDonough	" "
7/13/70	Charles McDonough	" "
7/13/70	Charles McDonough	Plaintiff (Raab)
10/ 1/70	Charles McDonough	Plaintiff (Less)
10/ 1/70	Junia Raab	Defendants
10/21/72	Eugene Murphy	Defendants
10/21/72	David Sweet	"
10/28/72	Eugene Murphy	"
10/28/72	David Sweet	"

Items of Plaintiff's Activity
from October 26, 1967 to June 3, 1974
Submitted In Opposition To Motion To Dismiss

Item No.	Date	Activity	Affidavit reference
1	11/ 9/67	deposition of D'Angelo	Sweet I, p. 4*
2	2/12/68	deposition of D'Angelo	Sweet I, p. 4
3	5/17/68	deposition of Till	Sweet I, p. 5
4	1/23/69	affidavit in opposition to motion to compel answers (Less deposition)	Sweet I, p. 6
5	9/26/69	deposition of Bartlo	Sweet I, p. 5
6	10/15/69	deposition of Bartlo	Sweet I, p. 5
7	1/29/70	deposition of McDonough	Sweet I, p. 5
8	4/24?70	letter to McDonough	Heffernan I, Ex. F**
9	4/27/70	letter to McDonough	Heffernan I, Ex. E
10	6/ 2/70	letter to McDonough	Heffernan I, Ex. G
11	6/12/70	letter to court	Heffernan I, Ex. H
12	6/23/70	deposition of McDonough	Sweet I, Ex. A
13	7/13/70	deposition of McDonough	Sweet I, p. 5
14	10/ 1/70	deposition of McDonough	Sweet I, p. 5
15	—/—/71	conversation with Kaufman	Sweet I, p. 8
16	—/—/71	conversations with Letts	Sweet I, p. 8
17	—/—/71	conversations with Boreanaz	Sweet I, p. 9
18	3/29/71	letter to Boreanaz	Sweet I, Ex. B
19	5/ 5/71	notices of deposition served on Singleton and Himmelfarb	Sweet I, pp. 8-9
20	6/ 1/71	leter to McDonough	Sweet I, Ex. C
21	6/17/71	affidavit in opposition to motion to quash subpoena (Singleton deposition)	Sweet I, p. 8
22	7/—/71	attended hearing on motion to quash	Sweet I, p. 8
23	8/19/71	letter to Boreanaz	Sweet I, Ex. D

* Sweet Affidavit dated May 14, 1975

** Heffernan Affidavit dated May 14, 1975

Item No.	Date	Activity	Affidavit reference
24	9/ 9/71	attended deposition of Himmelfarb	Sweet I, p. 10
25	10/12/71	motion to strike Himmelfarb's answer	Sweet I, p. 10
	10/15/71	attended hearing on motion to strike	Sweet I, p. 10
26	10/27/71	note of issue filed	Sweet I, p. 11
27	8/—/72	attended pretrial conference	Sweet I, p. 11
28	2/ 6/73	filed pretrial statement	Sweet I, p. 12
29	2/ 7/73	attended pretrial conference	Sweet I, p. 12
30	3/13/73	attended pretrial conference	Sweet I, p. 13
31	—/—/73	conversations with Bain	Sweet I, p. 14
32	7/ 5/73	conversation with Bain	Sweet I, p. 14
33	8/21/73	motion to substitute defendants	Sweet I, p. 15
34	1/18/74	conversation with Siemer	Sweet I, p. 15
35	2/ 7/74	attended pretrial conference	Sweet I, p. 16
36	2/14/74	motion for consolidation	Sweet I, p. 17
37	2/22/74	attended pretrial conference	Sweet I, p. 16
38	3/20/74	withdrew motion for consolidation; sent letter to the court	Sweet I, p. 17, Ex. F.
39	4/29/74	attended pretrial conference	Sweet I, p. 18

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 1967-190

JUNIA E. RAAB,

Plaintiff

—vs—

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants

On November 25, 1975, a decision was filed dismissing the complaint for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and a judgment entered on the same day. On December 16, 1975, the plaintiff filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the judgment and to reinstate the action. On December 24, 1975, the plaintiff filed an appeal from the judgment.

The filing of the notice of appeal ousted this court from jurisdiction of this cause. Nevertheless, under the procedures set forth in *Ryan* v. *United States Lines Company*, 303 F.2d 430 (2d Cir. 1962), a determination should be made whether or not the motion would be granted if properly before the court. If the answer is affirmative, then the circuit court may direct a remand.

After the filing of the motion, the defendants filed an answer on January 26, 1976 and plaintiff filed a supplemental affidavit and brief on February 11. After careful consideration of the original decision and the

papers filed in support of the motion, it is apparent that the issues raised by the plaintiff are appropriate for appeal, but not for argument of a 60(b) motion before the district court. The points made by plaintiff are a rehash of arguments which were made before, or which could have been made at the time of the first argument. Plaintiff's view of the facts and the conclusions to be drawn from the facts is different from that of the court's. I have carefully reviewed the proceedings of the original motion. My conclusion is that the findings of fact and conclusions to be made from these findings were warranted by the history of this litigation. Furthermore, in the present motion, plaintiff fails to discuss many of the material points made in the original decision to dismiss.

In addition, there is an essential failure in plaintiff's motion. Plaintiff's counsel fails to indicate under what subsection of Rule 60(b) the motion is brought. A review of his argument reveals that none of the subsections apply.

The motion is dismissed for lack of jurisdiction.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: March 9, 1976

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-1967-190

JUNIA E. RAAB

—vs—

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

SIR: Take notice of a JUDGMENT, of which the within is a copy, duly granted in the within entitled action on the 25th day of November 1975, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 25th day of November, 1975.

Dated: Buffalo, New York
November 25, 1975

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

TO: David L. Sweet, Esq.
Attorney for Plaintiff

Edward D. Siemer, Esq.
Deanne C. Siemer, Esq.
Robert M. Hitchcock, Esq.
Arnold N. Zelman, Esq.

TO: Ross L. Runfola, Esq. and Victor T. Fuzak, Esq.
Attorney for Defendant

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,

—v—

TABER INSTRUMENT CORPORATION, et al.,
Defendants.

ORDER

The defendants, Taber Instrument Corporation and the Estate of Ralph F. Taber, have moved for an adjournment of the discovery schedule established by order of the court dated April 1, 1975, pending the decision by the court of a Motion to Dismiss made by these defendants and joined by defendant, Warren J. Hildebrandt. The decision of that motion in favor of defendants would make discovery unnecessary, therefore good cause has been shown.

In order to ensure a prompt disposition of the Motion to Dismiss, the following schedule is established: Plaintiff will serve all affidavits and memoranda, if any, in opposition to the Motion on or before May 12, 1975. Defendants will serve all further affidavits and reply memoranda, if any, on or before May 17, 1975. A hearing on the Motion will be held at 11:00 a.m. on May 19, 1975.

The Motion for Adjournment is granted.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

May 1, 1975.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 1967-190

JUNIA E. RAAB,

Plaintiff

v.

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants

APPEARANCES:

HEFFERNAN, SWEET & MURPHY (DAVID L. SWEET, ESQ., of Counsel), Buffalo, New York, for Plaintiff.

FALK, SIEMER, GLICK, TUPPEN & MALONEY (EDWARD D. SIEMER and DEANNE C. SIEMER, ESQS., of Counsel), Buffalo, New York, for Estate of Ralph F. Taber.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (ROBERT M. HITCHCOCK, ESQ., of Counsel), Buffalo, New York, for defendant Joseph P. D'Angelo.

BRENNAN, CALLAHAN, TESSEYMAN, ZELMAN & RUNFOLA (ARNOLD M. ZELMAN and ROSS L. RUNFOLA, ESQS., of Counsel), Buffalo, New York, for defendant Benjamin Manasen.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (VICTOR T. FUZAK, ESQ., of Counsel),

Buffalo, New York, for defendant Warren J. Hildebrandt.

At a pretrial conference held on March 19, 1975, the court orally granted defense an opportunity to complete discovery in this case before trial on condition that the discovery be promptly made. To insure speedy compliance, the following time table is set. Defense counsel are to serve interrogatories not later than May 1st and plaintiff shall respond not later than June 1st. If the defense determines that depositions are required, it shall immediately schedule and complete them on or before August 1st. At the pretrial meeting defense indicated that after receiving the answers to interrogatories, request for admission pursuant to Rule 36 would probably be filed. These requests shall be filed 30 days after the filing of the answer to interrogatories or the completion of depositions, whichever is later. No adjournment of this schedule shall be arranged for between the parties by stipulation. Adjournments shall only be made after application to the court showing good cause in writing.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: April 1, 1975

APPENDIX G

UNITED STATES DICTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 1967-182

JOSEPH F. LESS,
Plaintiff

—vs—

TABER INSTRUMENT CORP., *et al.*,
Defendants

Civil 1967-190

JUNIA E. RAAB,
Plaintiff

—vs—

TABER INSTRUMENT CORP., *et al.*,
Defendants

At the June 3, 1974 meeting of attorneys with the court, it was agreed by all counsel that the trial in the case of *Less* v. *Taber Instrument Corp., et al.*, Civil 1967-182, should proceed first and that the proceedings in the case of *Junia E. Raab* v. *Taber Instrument Corp., et al.*, Civil 1967-190, be deferred until after the *Less* trial. Mr. McDonough reported to the court that Warren J. Hildebrandt was now represented by attorney Victor T. Fuzak. Mr. Fuzak could not be present at the meeting on the 3rd, but, with the consent of counsel, the court met with Mr. Fuzak on the 4th and he reported to the

court that he is retained to represent Mr. Hildebrandt and would be ready for trial in mid-October, 1974.

During the June 3 meeting, Mr. McDonough reviewed the present corporate organization of Taber Instrument Corporation and expressed his opinion that because of the present state of affairs of the corporation, there were no stockholders or directors able to act to retain an attorney to represent the corporation. It was suggested that court appoint a trustee to act in behalf of the corporation. The matter was adjourned until June 24, 1974 to permit counsel to submit a plan to the court so that representation for the corporation could be obtained.

Because attorneys Arnold Zelman, Ross Runfola and Victor Fuzak were only recently retained in this case, further leave was given to them to file motions or to take depositions. This work should be done not later than the 24th of June, 1974.

Plaintiff moved for an early trial date, suggesting September, 1974. After conferring with all counsel, including Mr. Fuzak on June 4, it appears to the court that earliest practical trial date is mid-October. Therefore, the court sets Tuesday, October 15, 1974 as the date for trial. At the June 24 meeting of counsel, the court will determine the pretrial step necessary so that the October setting can be met. Before June 24 the attorney for the plaintiff shall meet with the Clerk to prepare an exhibit list setting forth all exhibits which he intends to use at the time of trial.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: June 14, 1974

CORRECTED COPY

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1264

TABER INSTRUMENT CORPORATION, JOSEPH P. D'ANGELO, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER and MARINE MIDLAND BANK–WESTERN,

Petitioners,

v.

JUNIA E. RAAB,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioners,

v.

JUNIA E. RAAB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (Appendix A of Petition) is reported at 546 F 2d 522. The opinions of the district court with respect to the motion to dismiss (Appendix B of Petition) and to the motion to set aside the judgment of dismissal (Appendix C of Petition) are not reported.

Jurisdiction

The opinion of the Court of Appeals was filed December 13, 1976. The petitioner seeks to invoke jurisdiction of this Court under Section 28 U.S.C. § 1254 (1).

Question Presented

The question presented is whether the Court of Appeals was justified in deciding that it was an abuse of discretion for the district court to dismiss for failure of prosecution under the facts and circumstances of this action and its companion action.

The petitioners' characterization of the issue is in error and misrepresents the basis upon which the Court of Appeals made its determination.

Statement of Facts and of the Case

The presentation in the Petition of the pertinent facts and circumstances of the litigation is so seriously at variance with the record as to compel Respondent to set forth the following Statement of the Facts and of the Case.

Plaintiff is a former employee and shareholder of defendant Taber Instrument Corporation (TIC), which corporation on June 3, 1966, purchased from plaintiff all of his 600 shares of TIC for $8 per share, or $4,800. One month earlier, TIC had purchased from another stockholder and former employee, JOSEPH F. LESS (Less), 14,100 shares of its stock for $10 per share, or $141,000. Thereafter on December 30, 1966, TIC was acquired by TELEDYNE, INC. for $50 a share. In May, 1967, Less and Raab filed suits in the district court

(*Less* on May 9 and *Raab* on May 10), based upon violations of Sections 10b, 27 and 29 of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission, each alleging that TIC purchased his stock without disclosing that serious negotiations were in progress to sell TIC to Teledyne for a much higher price than he received for his stock; each sought rescission or, if rescission were for any reason denied, money damages, *i.e.*, $1,400,000 in *Less* and $60,000 in *Raab*. Both Less and Raab were represented by the same counsel, and the defendants were represented in both actions by the same respective counsel.

The two actions shared nearly identical issues of fact and law, similar answers were interposed by the defendants, and accordingly the cases were consistently treated as companion cases by all parties and the court throughout the proceedings, with *Less* the lead case because of its far greater magnitude. 2d Cir. App., pp. 177, 297, 613, 617. In each case the defendants adopted the position that there was no failure to disclose a material fact, asserting that at the time of the purchase of the stock by TIC the negotiations with Teledyne were not of sufficient importance to require disclosure. 2d Cir. App., p. 245.

Extensive discovery was taken in furtherance of both actions. In all, including the last depositions taken by the defendants in October, 1972, 24 depositions were taken (16 by the plaintiffs and 8 by the defendants) consisting of many hundreds of pages of testimony, and more than 200 exhibits were examined and marked. 2d Cir. App., pp. 5, 238.[1] The completion of the discovery was repeatedly delayed at the in-

[1] In addition, the plaintiffs sought unsuccessfully in 1971 to take the depositions of Teledyne, a California corporation, and defendant Himmelfarb, a resident of Mexico. 2d Cir. App., pp. 251, 253, 385, 387, 638.

stance of the defendants because of conflicting engagements of their counsel, and plaintiffs' counsel frequently protested such delays. 2d Cir. App., pp. 248, 272-276, 288-289, 290-296, 343-344. It was understood and agreed by counsel for all parties from the beginning, although without a formal stipulation on the record, that the basic discovery common to the central issue in both actions, which was the timing and character of the Teledyne negotiations, was being taken in *Less*.

Following the conclusion of plaintiffs' discovery, the plaintiffs filed notes of issue in both *Less* and *Raab* in October, 1971, for the November, 1971, trial term.[2] At the call of the trial calendar for that term the plaintiffs answered both cases ready for trial. 2d Cir. App., pp. 333, 344-345.

Thereafter the progress of the two actions to trial was continually regulated and supervised by the court. There were joint pretrial conferences held before U. S. Magistrate Maxwell on August 17, 1972, and February 7, 1973, and joint pretrial conferences and meetings held before the District Judge on March 13, 1973, February 7, 1974, April 29, 1974, and June 3, 1974. On each of these occasions plaintiffs' counsel stated that plaintiffs were ready for trial in both *Less* and *Raab*. However, at the August, 1972, conference before the Magistrate, counsel for defendants requested time to take additional depositions, and they were subsequently taken in October, 1972, pursuant to notices served by the defendants after the August, 1972, conference. The next pretrial conference was held by the Magistrate on February 7, 1973, at which time the defendants reported that they were now ready in both actions. In the course of settlement discussions, attorney McDonough, who was counsel in both *Less* and *Raab* for defendants TIC, Taber, Hildebrandt and Manasen, stated that he felt there would be little difficulty in arriving at settlement of *Raab* once *Less* was resolved, and plaintiffs' counsel said they agreed. 2d Cir. App., pp. 254-255, 342. At the close of that conference the Magistrate stated that he would refer both actions to the district judge for the scheduling of trial. 2d Cir. App., pp. 101, 113, 267.

[2] Local Rule 12 formerly required that a new note of issue be filed for each successive term. After 1971 that Rule was discontinued, and it was no longer necessary to file additional notes of issue for a case to retain its position on the trial calendar.

Subsequently the progress of the two cases was interrupted by various matters beyond the control of the plaintiffs, including the death of defendant Ralph Taber, the lapse of nearly five months before executors of his estate were appointed, and delays while the defendants made arrangements for the appointment of counsel for the Taber estate and of substitute trial counsel for defendants TIC, Manasen and Hildebrandt in place of Mr. McDonough, who was precluded by the canons of ethics from acting as trial counsel because of his status as a potential witness in both actions.

At the June 3, 1974, conference, it was agreed by the court and counsel for all parties that *Less* be tried first and that trial of *Raab* be deferred until after disposition of *Less*. Plaintiffs' counsel asked for an early trial date, but counsel for TIC and the Taber estate stated that other commitments would prevent them from proceeding to trial before the latter part of October, 1974. The court therefore scheduled *Less* for trial on October 15, 1974, and directed that *Raab* be deferred. The foregoing agreement was confirmed by order of the court dated June 14, 1974. 2d Cir. App., pp. 164-166.

The *Less* trial date was later adjourned three weeks to November 5, 1974, at the request of the defendants and over the objection of plaintiffs' counsel. 2d Cir. App., p. 286.

Attorney McDonough subsequently died on August 16, 1974. Substitute trial counsel had already taken over representation of all parties formerly represented by him, and the preparations for trial of *Less* on the court scheduled date continued without interruption. On the eve of trial, November 4, 1974, *Less* was settled for $560,000. The next day the district court approved the settlement and allowed the defendants 30 days in which to pay the settlement amount. The settlement was paid on December 3, 1974, and an order of dismissal on settlement entered that date. 2d Cir. App., p. 11.

There followed negotiations in December of 1974 and January of 1975 regarding settlement of *Raab*. They proved unsuccessful, and plaintiffs' counsel promptly notified the court clerk on January 24, 1975, requesting a meeting with the district judge to arrange for trial. 2d Cir. App., pp. 264-265.

Upon notice dated February 13, 1975, a conference was held before the district judge on March 19, 1975. Plaintiffs' counsel requested that the case be set down for trial, since the further settlement negotiations had been unavailing. Despite the fact that attorney McDonough had reported both *Less* and *Raab* ready for trial on February 7, 1973, the substitute counsel for TIC and the Taber estate now said that additional discovery was needed, and requested leave to serve interrogatories and possibly take other discovery. Over the objection of counsel for plaintiff, the court gave defense counsel until May 1, 1975, to serve interrogatories and established a timetable for completion of any further discovery by August 1, 1975. On April 29, 1975, instead of serving such interrogatories, defendants served a motion to dismiss for failure of prosecution, claiming prejudice from the loss of Mr. Taber and Mr. McDonough as trial witnesses.

The plaintiff submitted affidavits in opposition to the motion, disputing in many important respects the facts set forth in the defendants' affidavits, and finally on November 25, 1975, after hearing argument, but without conducting a hearing as to the controverted factual matters, the court granted the motion to dismiss.

The plaintiff filed a motion to set aside the judgment of dismissal pursuant to Rule 60(b) F.R.Civ.P., calling to the court's attention matters of record refuting essential findings of fact upon which the decision of dismissal was made. 2d Cir. App., p. 374. Plaintiff also filed a notice of appeal from the judgment of dismissal. 2d Cir. App., p. 439. On March 9, 1976, after receiving opposing affidavits and briefs, but without conducting a hearing as to the controverted factual matters, the district court denied plaintiff's motion on the basis of lack of jurisdiction in view of the docketing of the appeal, and stated that even if it had jurisdiction it would deny the motion. 2d Cir. App., pp. 556-558.

On March 12, 1976, plaintiff filed a notice of appeal from the denial of the motion under Rule 60(b).

By order of the Court of Appeals, both of the appeals were consolidated for hearing.

The Court of Appeals unanimously reversed the dismissal. After reviewing the entire proceedings in both *Less* and *Raab*, the Court of Appeals ruled that the conduct of the court and counsel in both actions from June 14, 1974, on, clearly made it an abuse of discretion for the district court to grant the defendants' motion for dismissal.

In view of this decision, the Court of Appeals found it unnecessary to act upon the denial of plaintiff's motion under Rule 60(b).

The petitioners' brief is replete with purported statements of fact which are without foundation in the record.

In straining to defend the dismissal by the district court, the defendants throughout their brief have resorted to many representations which are without foundation or are at variance with the record. In particular, the Court's attention is called to the following matters:

1. At page 3 of their brief, defendants explain the June, 1974, agreement of all counsel to the court's proposal that the *Less* case be scheduled for trial and that trial of *Raab* be deferred until after disposition of *Less*, as follows:

> This was thought to be necessary because the same lawyers represented plaintiffs and defendants in the two cases, and the proceedings could not be conducted simultaneously.

In truth, that agreement was based upon the express understanding of counsel and the court that the practical procedure was to resolve the issues common to both cases in the *Less* case, in view of the consensus that once *Less* was resolved *Raab* could readily be settled along the same lines. 2d Cir. App., pp. 254-255, 281, 341-342, 383-384, 402, 406.

2. At page 4 of their brief, petitioners make the statement that plaintiff's only discovery in *Raab* consisted of a single deposition and that "plaintiff did not evince any interest in further discovery or in means to narrow the issues at trial."

In fact, almost all the depositions taken in *Less* relating to the negotiations between Teledyne and TIC (*e.g.*, depositions of Taber, D'Angelo, McDonough, Hildebrandt, Till and Manasen) are crucial to the issues in the *Raab* case. Furthermore the depositions in *Less* relating to the negotiations of various parties with Joseph Less for the purchase of his

stock (*e.g.*, depositions of Taber, D'Angelo, Hildebrandt, Bartlo, Manasen, McDonough, Less, Till, Murphy and Sweet) are also important and relevant to *Raab*, since the sudden interest and activity of the TIC insiders in buying Less's stock is a strong indication that the Teledyne/TIC negotiations had in fact reached a significant stage by the spring of 1966.

3. At page 4 of their brief, petitioners indicate that they first became aware of their alleged serious prejudice after the March, 1975, pretrial conference (in which they requested and were granted time for further discovery) when they assessed the state of their case in light of the loss of Mr. Taber and Mr. McDonough, and that they were then compelled to elect not to commence discovery but move instead to dismiss. The Court of Appeals aptly dealt with that argument as follows:

> The appellees now claim that because of the deaths of important potential witnesses (Taber, who died in February, 1973 and McDonough, who died in August, 1974) they have been seriously prejudiced by the delay. At the time of appellees' agreement with the order of June 14, 1974, Taber had no longer been available for over fifteen months, but his death was no obstacle to their agreement in the order, and McDonough's death in August, 1974 did not deter the parties from a continuance of trial preparations and settlement conferences for a year thereafter.

Furthermore, the record shows that present counsel for the petitioners had obviously fully familiarized themselves with every aspect of both *Less* and *Raab* long before March, 1975, for they filed in March, 1974, an extensive and minutely detailed memorandum in opposition to the plaintiffs' motion to consolidate the two cases. 2d Cir. App., pp. 139-160.[3]

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[3] The Siemer firm, substitute counsel for TIC and the Taber estate, had been actively involved with both *Less* and *Raab* since the summer of 1973, although they were not formally substituted as counsel in *Less* until February, 1974, and in *Raab* until March, 1974. 2d Cir. App., pp. 256-258.

In addition the petitioners fail to inform the Court that Mr. Taber had been examined extensively regarding the matters common to both *Less* and *Raab, i.e.*, the Teledyne negotiations, the acquisition of TIC and its liquidation, in depositions covering 320 pages, with over 40 exhibits (Transcripts R. 62, 63, 64), and that he did not directly participate in the negotiations for the purchase of Raab's stock. 2d Cir. App., p. 53.

As the record shows, Mr. McDonough was also examined in detail regarding the Teledyne/TIC transactions, the liquidation of TIC and the negotiations for the purchase of both the Less and ... Raab stock. He testified that he alone conducted the negotiations with Raab's then attorney, Franklin Ness, for Raab's stock, that he had by then personal knowledge of the Teledyne negotiations and that he made no disclosure of them to Mr. Ness. He testified fully as to the facts within his knowledge concerning the matters pertinent to the issues of this action, *i.e.* whether Raab is entitled to rescission of the sale of his stock by virtue of nondisclosure of a material fact, the Teledyne negotiations. 2d Cir. App., pp. 53-80; R. 74, 76.[4]

4. With regard to the reference at page 5 of the petition regarding warnings of possible dismissal given "on numerous occasions," there is no substantiation for same in the record, and the defendants in their affidavits in the district court proceedings cited no such instance. Nowhere in the entire record of the proceedings in *Less* or *Raab* is any such warning recited or referred to by the court or anyone else. Transcript of Proceedings March 19, 1975, 2d Cir. App., pp. 394-408; Combined Transcript, R. 167.

[4] Reference "R" is to the Supplemental and Revised Index to Record on Appeal, of documents not reproduced in the 2d Cir. Appendix.

5. Also at page 5 of their brief, the petitioners state without substantiation and erroneously, that prior to the 1974 settlement of *Less* plaintiff twice faced dismissal and four times failed to comply with court orders. In fact, as the record shows, this action came up once, and only once, on the dismissal calendar,[5] and it was removed therefrom routinely in accordance with district court practice upon receipt by the court of the letter from plaintiff's counsel of June 12, 1970, pointing out the relationship between *Less* and *Raab* and referring to the discovery proceedings previously taken and then in progress in *Less* affecting both cases. 2d Cir. App., p. 297.

As to the plaintiffs' alleged failure of compliance in filing a pretrial statement, it was commonly accepted practice in the district court to defer the filing of a pretrial statement, notwithstanding the wording of the *pro forma* order accompanying a notice of pretrial conference, since it might be determined at the conference that the case was not really ready for a final conference and the statement would therefore be premature or incomplete. This the U. S. Magistrate has confirmed. 2d Cir. App., pp. 383-384. Petitioners fail to inform this Court that the *pro forma* orders for pretrial statement attached to the notices of pretrial conferences were directed to *all* the parties, and *none* of the parties filed a pretrial statement until the February, 1973, conference, which was held after defendants had finally completed their discovery in the fall of 1972. Plaintiffs fully complied by filing a complete joint statement for both *Less* and *Raab*, and the defendants also filed joint statements for the two ac-

[5] Local Rule 11 provides that if the court's docket does not reflect any action for one year preceding, the clerk shall issue a notice that unless sufficient cause be given at the call of the calendar for the next term, an order of dismissal without prejudice shall be entered by the clerk as of course.

tions, although attorney McDonough did not file a statement on behalf of TIC, Taber, Manasen and Hildebrandt until two days after that conference. 2d Cir. App., pp. 254, 383-385.

6. The petitioners can cite no substantiation for the statement at page 6 of their brief that after December 1974, "plaintiff took no further positive action and continued with dilatory tactics." As has been shown, plaintiff endeavored in good faith to settle *Raab* along the same lines upon which *Less* had been settled in December, 1974, and when this failed promptly notified the court and requested that the case be scheduled to arrange for trial. 2d Cir. App., pp. 264-265, 535-536.

7. The petitioners also state, without substantiation, that the plaintiff failed to meet the deadline for response to defendants' motion to dismiss and failed to respond to defendant D'Angelo's interrogatory.

Plaintiff's response to the motion to dismiss was filed and accepted in accordance with a three-day verbal extension of the court.

The D'Angelo interrogatory served was not answered because it was objectionable as being too sweeping and burdensome, as the district court has since ruled. Following the Court of Appeals' reversal of the dismissal, D'Angelo's counsel made a motion to compel plaintiff to answer said interrogatory, which plaintiff opposed, and on February 25, 1977, the district court rendered a decision denying the motion, on the ground that the interrogatory was an improper single, sweeping, all encompassing inquiry. A copy of the district court's decision on that motion is appended hereto as Appendix A.

8. Also at page 6 of their brief, the petitioners refer to the statements in the decision of dismissal that in *Raab* the defendants had always asserted their readiness for trial and had never delayed proceedings before the court. The record is otherwise. 2d Cir. App., pp. 248-249, 251-253, 256-261, 343-344. As late as March 19, 1975, the defendants said they were not yet ready for trial, and needed more time for further discovery.[6]

The Court of Appeals took notice of this further period of delay initiated by the defendants and in contradiction of defense counsel's representations on appeal by stating in its opinion:

> The court scheduled a pretrial conference for March 19, 1975, at which time the court allowed the defendants time for additional discovery—actually extended to August 1, 1975. 546 F. 2d at 523.

9. The defendants make the surprising representation at page 15 of the petition that when they made their March, 1975, request for further discovery, *"there had been no previous discovery in the Raab case by the defendants,* and the plaintiffs had taken only one very short deposition." (Emphasis added.)

In fact, the defendants had previously taken an extensive deposition of plaintiff Raab himself. 2d Cir. App., p. 338; R. 22.

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[6] At the March 19, 1975, proceedings, after plaintiff requested early trial, defense counsel Siemer stated:

> Well, there is a matter before trial, your Honor, and that is as I have said all along I am not satisfied with the discovery in this case. This was a case that was tagging along with the Less case. Everyone's attention was focused on the Less case. There is very little discovery in this case. It is not adequate with respect to our client. I would expect some additional substantial discovery if this case is going to trial (*sic*) 2d Cir. App., p. 402.

In addition, the Court's attention is invited to the fact that the taking of the deposition of plaintiff Raab by defendants was initiated by counsel for the plaintiff. 2d Cir. App., pp. 305-306.

The foregoing illustrate how grossly the defendants have again misrepresented the facts and distorted the record, even to this Court.

Argument

In this case the Court of Appeals, after reviewing the facts and circumstances of the proceedings below in both the *Raab* case and in the companion *Less* case, determined that dismissal of the action for failure of prosecution under such circumstances was not justified. That determination is correct and is in conflict with no decision of this Court or other courts of appeal.

There is no valid basis for the assertion by the petitioners that the decision of the Court of Appeals is "an important new interpretation of Rule 41(b)." The decision is entirely consistent with the cases cited by the defendants, which are authority for the well settled proposition that there is no precise rule as to what circumstances justify a dismissal under Rule 41(b), and that each case must be assessed on its own facts. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962); *Securities and Exchange Commission v. Power Resources Corp.*, 495 F.2d 297 (10th Cir. 1974).

In its decision the Court of Appeals gives due recognition to the significance of the June, 1974, agreement of the court and all counsel to defer trial of *Raab* pending the disposition of *Less*, and to the events which followed, *i.e.*, the preparations for trial of *Less*, the settlement of *Less* on the eve of trial for $560,000, the subsequent negotiations for set-

tlement of *Raab*, the request by the defendants for further postponement of *Raab* for the taking of additional discovery.

The Court of Appeals also recognized that by entering into the June, 1974, agreement and proceeding thereafter in accordance with that agreement, the defendants acknowledged that no grounds existed for dismissal of either *Less* or *Raab* for failure of prosecution. The Court of Appeals properly rejected the defendants' belated claim of prejudice because of the deaths of potential witnesses Taber and McDonough, pointing out that at the time of the defendants' agreement with the order of June 14, 1974, Taber had already been dead for over fifteen months, and that the death thereafter of McDonough (who was to be a potential witness in *Less* as well as in *Raab)* did not interfere with preparations for trial of *Less*, nor cause the defendants to raise the possibility of a motion to dismiss either *Less* or *Raab* for failure of prosecution.

The Court of Appeals further stated as follows:

> "There can be no question that all counsel, parties and the court understood and acquiesced in the above time schedule. None of the grounds, now so vigorously asserted by the appellees as preiudicial, were advanced in opposition to the court's order of June 14, 1974, or to subsequent proceedings." 546 F.2d at p. 523.

The emphasis given the foregoing circumstances by the Court of Appeals was entirely justified and correct.

The Court of Appeals rightly considered it inconceivable that the defendants could be deemed not to have waived any claim of procedural delays justifying dismissal which preceded that June, 1974, agreement. Certainly the court did not err in imposing the equitable principles of waiver and estoppel against the defendants under these circumstances. A con-

trary result would obviously have been unconscionable as to plaintiff Raab, who in good faith agreed to deferral of his action as part of said overall agreement with counsel and the court in *Less* and *Raab*.

Petitioners err in contending that the interpretation of the Court of Appeals in this action holds that the district court was prevented from examining the entire procedural history of the cases in exercising its discretion with respect to the motion to dismiss. On the contrary, the Court of Appeals expressly indicated that in its determination it had taken into account the procedural history of both *Raab* and *Less* prior to the June, 1974, agreement of counsel and the court, stating at 546 F.2d 523:

> "The two cases between May 8, 1967 (Less) and May 10, 1967 (Raab) and June 3, 1974, produced sundry depositions, notes of issue, calendar calls, pretrial conferences, etc."

The Court of Appeals determined that the pre-1974 matters belatedly raised by the defendants in their March, 1975, "diversionary tactic" (in the words of the Court) were in any event of insufficient importance to outweigh the effect of the June, 1974, agreement and the conduct of the parties in both *Less* and *Raab* from that time forward.[7]

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[7] The Court's attention is called to the fact that the defendants made an extensive presentation of the facts and circumstances urged by the defendants as the basis for upholding the dismissal in their brief of 58 pages to the Court of Appeals, with countless references to the 669-page Joint Appendix.

This case is distinguishable on its own facts from the authorities cited by the defendants

The determination of the Court of Appeals in this case turned upon the facts and circumstances present here, just as in any case involving the question of whether circumstances justify dismissal for failure to prosecute. The cases cited by the defendants in which dismissals were upheld are distinguishable on their facts from this case, for they all involve long unexcused delay on the part of the plaintiff of such nature and extent as to lull a defendant into assuming that the plaintiff did not seriously intend to bring the case on for trial, or serious violations of calendar rules or orders of the court.

Such is not the case here. Notwithstanding the exhaustive assemblage of specious detail set forth in defendants' motion to dismiss and in their briefs on appeal, replete with distortions and misrepresentations of the actual facts and circumstances of the litigation in *Less* and *Raab*, it remains undisputed that after completion of their discovery, following many delays attributable to the defendants, plaintiffs filed notes of issue for the November, 1971 trial term and answered both *Less* and *Raab* ready for trial at the call of the calendar for that term; stated that plaintiffs were ready in *Less* and *Raab* at the next calls of the cases, *i.e.*, the pretrial conferences in August, 1972, March 13, 1973, February 7, 1974 and April 29, 1974; following agreement of all counsel and the court on June 3, 1974, that *Less* proceed to trial and that *Raab* be deferred until after trial of *Less*, proceeded with preparation for trial of *Less*, and obtained settlement on the very day scheduled for trial, in the amount of $560,000. 2d Cir. App., pp. 333, 344.

As the Court of Appeals properly pointed out in its decision, the matters which the defendants belatedly claimed

as the basis for dismissal of *Raab* all took place prior to the June, 1974, agreement to defer trial of *Raab*.

None of the cases cited by the defendants involved factual circumstances remotely resembling the situation present here, wherein there was an argument to defer trial of an action until after trial of a far greater companion action, pursuant to an expressed consensus of counsel that the smaller deferred action would likely be readily settled along the same lines as those upon which the larger case was resolved.

The petitioners assert, at page 12 of their brief, that the Court of Appeals was "inordinately interested" in the settlement negotiations in *Less* and *Raab*, pointing out in its decision that the differential between the amount received by Less and the Teledyne price was $40, or $560,000 for his 14,000 shares, that *Less* was settled in November, 1974, for $560,000, and that using comparable figures the *Raab* differential would have been $25,200.

The court's reference to the settlement proceedings was entirely justified since the record shows that it was the consensus of counsel for all parties prior to the June, 1974, agreement to defer *Raab*, that once *Less* was resolved it was likely that *Raab* could be readily settled along the same lines.

The references at pages 14 and 15 of the petition to alleged "minimal delay attributable to the defendants' consideration of discovery" fails to disclose that the Siemer firm had been involved in the litigation in both *Less* and *Raab* since July of 1973, and by at least March, 1974, had become entirely familiarized with all aspects of both actions. In addition, the defendants for whom they were substituted as record counsel had formerly been represented by attorney McDonough, characterized by defendants' present counsel in the proceedings in the district court as "a distinguished and able practitioner." 2d Cir. App., p. 231. Attorney McDonough had declared his clients ready for trial in both *Less* and *Raab*, with all discovery completed, at the 1973 conference before the Magistrate.

Also, in endeavoring to excuse their untimely request in March, 1975 for further delay to take additional discovery, the defendants state that there had been no previous discovery in *Raab* by the defendants; the record shows that in fact the defendants had taken an extensive deposition of plaintiff Raab on Oct. 1, 1970. 2d Cir. App., p. 338; R. 22.

There is no important question of federal law requiring review by this court

This case involves the determination of a factual question, *i.e.*, whether under the circumstances of the litigation in both *Less* and *Raab* it was an abuse of discretion to dismiss *Raab* upon the motion made by defendants on April 29, 1975, nearly a year after the defendants, through the same counsel, had agreed to defer trial of *Raab* pending disposition of a much larger companion case. The Court of Appeals held that under these circumstances dismissal of *Raab* pursuant to such an untimely motion was not justified.

In reaching this determination the Court of Appeals also found that in view of the facts and circumstances of the combined litigation occurring both before and after that 1974 agreement, the claim of prejudice belatedly raised by the defendants was without merit.

It is evident that the decision of the Court of Appeals is entirely in keeping with the principles and interpretations applied by this Court and the other Circuit Courts with respect

to questions of discretionary dismissal for failure to prosecute, and that the decision here was based upon the special facts and circumstances of this combined litigation.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID L. SWEET,
Counsel for Respondent.

April 7, 1977.

APPENDIX A

Order of the District Court Dated February 25, 1977 Denying Motion of Defendant D'Angelo to Compel Plaintiff to Answer Interrogatory

UNITED STATES DISTRICT COURT
Western District of New York

JUNIA E. RAAB,

Plaintiff,

vs.

TABER INSTRUMENT CORPORATION, a New York Corporation, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER and MARINE MIDLAND BANK-WESTERN, Executors of RALPH F. TABER, Deceased,

Defendants.

Civ-1967-190

The motion of defendant D'Angelo to require plaintiff to answer the interrogatory is denied. The interrogatory reads: "State in full the facts you intend to present in support of your claim that liability exists on the part of defendant Joseph P. D'Angelo." The plaintiff's description of this interrogatory as a "single sweeping, all-encompassing inquiry" is well put. *See* Vol. 4A, MOORE'S FEDERAL PRACTICE, ¶ 33.08, at 33-50, 51.

Order of the District Court Dated February 25, 1977 Denying Motion of Defendant D'Angelo to Compel Plaintiff to Answer Interrogatory

The parties are directed to meet with the court to make trial arrangements on March 23, 1977 at 9:00 a.m.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: February 25, 1977